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NO. 88-426

IN THE

Supreme Court of the United States

OCTOBER TERM, 1988

AUBURN NATIONAL BANK OF AUBURN
A National Banking Association, *Petitioner,*

v.

FRANCIS M. SANDA

and

EDWARD GOSSETT, *Respondents.*

BRIEF FOR RESPONDENT EDWARD GOSSETT IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI TO THE COURT OF APPEALS OF INDIANA

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QUESTIONS PRESENTED

1. Whether it is a denial of due process for the State of Indiana to give no notice to mortgagees before the issuance of a tax deed, which terminates the rights of redemption and reversion where no irregularities in the tax sale proceedings rendering them void have been demonstrated.

2. Whether a post tax sale mortgagee had standing to assert Fourteenth Amendment unconstitutionality of pre tax sale notice because it violated the pre tax sale mortgagee's right to due process.

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BRIEF FOR RESPONDENT EDWARD GOSSETT IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI TO THE COURT OF APPEALS OF INDIANA

The respondent, Edward Gossett, respectfully prays that petitioner's request for a writ of certiorari be denied.

STATEMENT OF THE CASE

Petitioner, a post tax sale mortgagee to the post tax sale purchaser, respondent Francis M. Sanda, instituted this action to set aside the deed issued to the tax sale purchaser, respondent Edward Gossett, and to have title quieted in Sanda.

Indiana law at that time required the county auditor to send notice to owners of record as well as to mortgagees which had

filed a request for such notice with the auditor and paid a fee therefor. A tax sale purchaser received a certificate of sale, which, if not redeemed within two years following the sale, could be exchanged for a deed from the county auditor. Prior the expiration of the two year period, the auditor was required to send notice of the proposed issuance of the tax deed to the owners of record.

Notice of the tax sale was sent by certified mail to the local officer of the corporation which then owned the real estate in question. Respondent Sanda was an officer, director and shareholder in such corporation. Such local officer of the corporation had been terminated by the corporation before the notice of the tax sale was sent. No notice was sent to the then mortgagee of the corporation, which had not filed a request for such notice as then provided for by Indiana law. The notice sent was returned to the auditor by the post office undelivered and marked "not deliverable as addressed — unable to forward."

The corporation was subsequently liquidated with Sanda receiving the real estate in question as part of his shareholder's distribution. The pre tax sale mortgagee was paid by Sanda with funds loaned to him by the Petitioner. The corporation's deed to Sanda and Sanda's mortgage to Petitioner were recorded the same day that the county auditor sent notice of the issuance of the tax deed certified mail to the same person to whom notice of the tax sale had been sent. Such notice was also returned undelivered marked "moved, not forwardable — forwarding order expired." Thereafter the deed to Gossett was issued and recorded.

The trial court's judgment after a bench trial set aside the tax deed and vested title in Respondent Sanda. Upon Respondent Gossett's appeal, the Indiana Court of Appeals reversed and remanded with instructions to vacate the judgment vesting title in Sanda and to enter judgment quieting title in Gossett. Petitioner's petition for rehearing to the Court of Appeals of Indiana and petition for transfer to the Supreme Court of Indiana were denied without opinion.

REASONS FOR DENYING THE PETITION FOR WRIT OF CERTIORARI

I.

THE HOLDING OF THE COURT OF APPEALS OF INDIANA THAT THE TWO YEAR PERIOD OF REDEMPTION FOLLOWING A TAX SALE AS ANALOGOUS TO THE SELFEXECUTING FEATURE OF STATUTES OF LIMITATION IS CONSISTENT WITH THE PRIOR DECISIONS OF THIS COURT.

The Indiana procedure for tax sales of real estate remains substantially the same as it was when reviewed by this Court in *Mennonite Board of Missons v. Adams*, 462 U.S. 791 (1983) and is fairly summarized at page 10 of Petitioner's brief. See Petitioner's Appendix pages A-23 through A-27 both inclusive for verbatim text. The county auditor is required to send notice of the tax sale by certified mail to owners of record as well as to mortgagees which have filed a request for such notice and paid the fee therefor.[1] A purchaser at the sale receives a certificate, which after the passage of two years, he may surrender for a deed from the county auditor. Prior to the expiration of the two year period the county auditor is also required to send notice of the proposed issuance of the deed by certified mail to the owners of record.

A. The Issuance of the Tax Deed Evolves From The Owner's Failure To Redeem Rather Than State Action.

The decision of the Court of Appeals of Indiana was based on the decision of the Supreme Court of Indiana in *Calhoun v. Jennings*, 512 N.E.2d 178 (Ind. 1987) where facts identical to those here at issue were presented. There the post tax sale

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[1] Effective January 1, 1988, the notice of tax sale provision was amended to eliminate the reference to mortgagees as well as the requirement to file a request for notice with the county auditor and pay a fee therefor and substituted the requirement that notice of the sale be sent to "all persons having a substantial property interest of public record." Indiana Code 6-1.1-14-4.2.

mortgagee contended that *Mennonite* required notice of the proposed issuance of the tax deed as well as notice of the tax sale to be sent to mortgagees. In disposing of the issue, the Supreme Court of Indiana relied on *Mullane v. Central Hanover Bank & Trust Company*, 339 U.S. 306 (1949) and *Texaco, Inc. v. Short* (1982), 454 U.S. 516 (1982) and concluded that the due process requirements articulated in *Mullane* and *Mennonite* were satisfied by the notice of tax sale. The Court then went on to analogize the notice of issuance of the deed to the self-executing feature of the Indiana Mineral Lapse Act involved in *Texaco* so that interested parties were not entitled to additional notice of the lapse of the redemption period.

Nor is the *Calhoun* decision in conflict with *Tulsa Professional Collection Services, Inc. v. Pope*, ____ U.S. ____, 108 S.Ct. 1340, 99 L.Ed.2d 565 (1988). While this Court held that known claimants were entitled to actual notice of the commencement of the period of limitations for filing claims, neither the majority nor dissent suggested the requirement of a second notice that the period for filing claims was about to expire.[2]

B. The Mortgagee Possesses A Substantial Property Interest Which Is Significantly Affected By A Tax Sale.

This fact was noted by Justice Marshall in *Mennonite* at page 798. Neither has this fact been ignored by the Supreme Court of Indiana in *Calhoun*, nor by the Court of Appeals of Indiana in the present case. The Petitioner was not a mortgagee at the time of the tax sale, and did not acquire its interest until almost two (2) years later. Given the dramatic disparity between the

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[2] Petitioner suggests that the Indiana Supreme Court's holding is in conflict with *Wylie v. Patton*, 111 Idaho 52, 720 P.2d 649 (Idaho Ct. App. 1986), however that is not the case. There is no tax sale in Idaho as in Indiana. Rather, if real property taxes are delinquent, Idaho Code Section 63-1126A authorizes a county treasurer, after a hearing before the board of county commissioners, to issue a tax deed conveying title for the property to the county. But before title can be thus transferred, the treasurer must give notice of the pending issuance of tax deed to owners of record which notice further states the opportunity to be heard before the board of commissioners prior to the issuance of the deed.

amount necessary to redeem the property from tax sale and the amount of Petitioner's mortgage, one can only speculate why Petitioner did not conduct a search of the county records prior to advancing funds to Sanda. Such a search would have disclosed the outstanding tax sale certificate. Sanda's deed and Petitioner's mortgage were recorded June 29, 1984, and as late as August 10, 1984, both Petitioner and Sanda had an absolute right under Indiana law to redeem the property from tax sale, yet neither did. As Justice Johnson wrote in *Hawkins v. Barney's Lessee*, 5 Pet. 457, at 466:

> "What right has any one to complain, when a reasonable time has been given him, if he has not been vigilant in asserting his rights?"

C. The Termination Of Redemptive And Reversionary Interests By The Issuance Of The Tax Deed Is Merely A Confirmation Of Rights Previously Existing.

Petitioner cites *Griffin v. Griffin*, 327 U.S. 220 (1946) at 233-234 as holding:

> "Due process does not require that notice be given before confirmation of rights theretofore established in a proceeding of which adequate notice was given."

Since Petitioner was neither an owner nor a mortgagee at the time the notice of the tax sale was given, the question of the adequacy of the notice then given was never an issue. Indeed the Court of Appeals of Indiana found (Petitioner's appendix A-9):

> "The parties to this appeal have not demonstrated any irregularities in the tax sale proceedings which render them void, nor have we found any."

II.

PETITIONER LACKS STANDING TO RAISE THE ISSUE OF THE STATE'S FAILURE TO PROVIDE PROPER NOTICE OF THE TAX SALE AND ON THE MERITS PETITIONER SUFFERED NO HARM AS A RESULT OF ANY INADEQUACY IN THE NOTICE OF THE TAX SALE.

A. Auburn National Bank Lacks Standing To Assert The Failure Of Notice Of The Tax Sale.

It is fundamental that a party seeking to raise a constitutional claim or defense must show that he has the requisite standing to do so. *Darnell v. Indiana*, 226 U.S. 390 (1912); *Lindsley v. Natural Carbonic Gas Co.*, 220 U.S. 61 (1911); *Cheaney v. State*, 259 Ind. 138, 285 N.E.2d 265 (Ind. 1972), cert. den'd, 410 U.S. 991 (1973). Petitioner, who acquired its interest in the property in question after it had been sold at tax sale, has no standing to litigate the constitutionality of IC 6-1.1-24-4.2 vis-a-vis a prior mortgagee's Fourth Amendment due process right to notice by mail under *Mennonite* because Petitioner cannot demonstrate any direct pecuniary loss caused by the operation of that allegedly unconstitutional statute.

B. IND. CODE Section 6-1.1-24-4.2 Placed The Burden Of Receiving Notice On The Mortgagee.

This Court, in *Mennonite*, did not address the provision requiring notice by mail to be sent only to those mortgagees who requested such notice and paid the appropriate fee therefore as that provision was enacted after the relevant proceedings in *Mennonite*. Neither did the Supreme Court of Indiana address the issue in *Calhoun v. Jennings* having concluded that a post tax sale mortgagee lacked standing to raise the issue and having further noted (at 182, 512 N.E.2d):

> "We note that the state legislature has since modified the statute in such a way as to remove the alleged constitutional infirmity." (citation omitted)

Although the issue has been addressed in several states with similar statutes with varying results, the issue is not here relevant since it had no impact on Petitioner.

CONCLUSION

For all the foregoing reasons, Respondent respectfully prays that Petitioner's petition for a Writ of Certiorari to the Court of Appeals of Indiana be denied.

Respectfully submitted,

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